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No. 277

In the Supreme Court of the United States

OCTOBER TERM, 1960

PHILIP YASA, PETITIONER

v.

P. A. ESPERDY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE FOR THE NEW YORK DISTRICT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The order of the court of appeals dismissing petitioner's appeal (I–R. 10)[1] is not reported.

JURISDICTION

The order of the court of appeals was entered on June 7, 1960. The petition for a writ of certiorari was filed on July 28, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Petitioner has separately paginated the record on appeal, here designated as "I–R.," and the record in the district court, here designated as "II–R."

QUESTION PRESENTED

The Attorney General denied the application of petitioner, who is a deportable Yugoslav seaman, for a stay of deportation under Section 243(h) of the Immigration and Nationality Act of 1952. The question presented is whether the court of appeals properly refused to overturn this refusal to grant discretionary relief.

STATUTE INVOLVED

Section 243(h) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1253(h)) provides as follows:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.

STATEMENT

Petitioner is a native and citizen of Yugoslavia, where his wife and child still live. He entered the United States at Norfolk, Virginia, on January 8, 1957, as a nonimmigrant crewman (II-R. 2, 6). After he had overstayed his shore leave, deportation proceedings were instituted against him. It was found that he was deportable, but he was given the privilege of departing voluntarily. No appeal was taken to the Board of Immigration Appeals. When petitioner failed to leave within the period allowed for voluntary departure, a warrant for his deportation was issued on January 17, 1958 (II-R. 6-7).

Thereafter, petitioner applied to the Attorney General to withhold his deportation under Section 243(h) of the Immigration and Nationality Act of 1952, *supra*, claiming that he would be subject to physical persecution if he were deported to Yugoslavia. A hearing was held before a Special Inquiry Officer, at which petitioner was represented by counsel. Petitioner testified that he had been a seaman on various vessels of his native country since 1949. He stated that he feared to go back to Yugoslavia because he had been seen going to church while in the United States and because the Captain [2] had said that when he returned to Yugoslavia he would be punished. Petitioner said that he went to church when he was in Yugoslavia, but that he did so secretly, as the commissar watches and those who go to church do not get jobs. He had never had difficulty in getting jobs on this account. A commissar had warned his wife that she should not go to church. Petitioner testified that he had openly criticized communism to friends while he was in Yugoslavia. He also was of the opinion that the authorities would regard him as being opposed to communism because he had left his ship (see App., *infra*, pp. 10–11).

Petitioner offered in evidence a certificate evidencing his membership in a New York Catholic Church, an affidavit of another person stating that religious persecution exists in Yugoslavia, a copy of a report of the Croatian Catholic Clergy of the United States,

[2] Petitioner later testified that it was not the Captain, but a commissar on board his vessel who had said this. He did not know the commissar's name (see App., *infra*, p. 11).

and an article in the New York Herald Tribune of November 1, 1957, relating to a report of the Zellerbach Commission concerning refugees from Yugoslavia (see App., *infra*, p. 11).

The Special Inquiry Officer found that petitioner had failed to establish that he would be subject to physical persecution and recommended that his application be denied (see Appendix, *infra*, p. 13). This recommendation was approved by the Regional Commissioner and adopted by the Attorney General (II–R. 9). Petitioner then sought review by a writ of habeas corpus. The district court denied the writ. The court of appeals, after hearing argument on petitioner's application for a stay of deportation, on its own motion dismissed the appeal as frivolous (I–R. 10).

ARGUMENT

Petitioner has been adjudged a deportable alien and he does not deny the correctness or propriety of this administrative determination. In his petition for habeas corpus, he challenged only the refusal of the Attorney General to grant him relief under Section 243(h) of the Immigration and Naturalization Act of 1952, *supra*, p. 2, on the ground that he would be subjected to physical persecution if he returned to Yugoslavia. His basic contention is that the decision of the Attorney General denying him relief was erroneous. We submit that this contention is frivolous, justifying the summary action of the court below in dismissing his appeal.[1]

[1] Petitioner's contentions are substantially the same as those raised in *Roncevich* v. *Esperdy*, No. 99, this term, pending on petition for a writ of certiorari.

The proceeding under Section 243(h) is completely unrelated to the issue of the alien's right to remain in the United States. Instead, relief under Section 243(h) is a privilege to be granted a deportable alien when, in the "opinion" of the Attorney General, deportation would subject the alien to physical persecution. The legislative intent to grant in Section 243(h) the broadest possible authority to the Attorney General is apparent when that section is compared with its predecessor, the Internal Security Act of 1950, 64 Stat. 1010. That act required withholding the deportation of any alien to a country which the Attorney General found would subject him to physical persecution. The present statute, rather than requiring that such an alien not be deported, states that "[t]he Attorney General is authorized to withhold deportation" when "in his opinion" physical persecution would be the result. In other words, the power to relax the deportation provisions on the ground of physical persecution is given to the Attorney General to be exercised by him according to his own best judgment. This judgment is necessarily based upon the knowledge he acquires through governmental channels as to political conditions in a particular country and by the particular facts of each individual case. *United States ex rel. Moon* v. *Shaughnessy*, 218 F. 2d 316 (C.A. 2); *United States ex rel. Dolenz* v. *Shaughnessy*, 200 F. 2d 288 (C.A. 2), certiorari denied, 345 U.S. 928; *United States ex rel. Dolenz* v. *Shaughnessy*, 206 F. 2d 392 (C.A. 2).

The hearing provided under Section 243(h) is therefore not the classic administrative kind in which the hearing officer may be upheld in his decision only if there is substantial evidence to support it. The Attorney General, having been "advised by the alien as to the basis of his fears" (*Namkung* v. *Boyd*, 226 F. 2d 385, 388 (C.A. 9)), decides a "political issue into which the courts should not intrude." *United States ex rel. Dolenz* v. *Shaughnessy, supra*, 206 F. 2d at 395; see *United States ex rel. Cantisani* v. *Holton*, 248 F. 2d 737 (C.A. 7), certiorari denied, 356 U.S. 932; *Cheng Fu Sheng* v. *Barber*, 269 F. 2d 497, 500 (C.A. 9). Because of the nature of the issues involved in such a proceeding, the courts have uniformly refused to disturb a determination adverse to the alien unless "the Attorney General or his delegate should deny the alien any opportunity to present evidence on the subject of persecution or should refuse to consider the evidence presented by the alien." *United States ex rel. Dolenz* v. *Shaughnessy, supra*, 206 F. 2d at 395; see *United States ex rel. Moon* v. *Shaughnessy, supra*, 218 F. 2d at 318; *United States ex rel. Cantisani* v. *Holton, supra*, 248 F. 2d at 738-739; *Cakmar* v. *Hoy*, 265 F. 2d 59, 62 (C.A. 9).

Application of these settled principles to this case makes clear that petitioner has no basis for attacking the Attorney General's determination. Represented by counsel of his own choice, he was granted an administrative hearing at which full opportunity was afforded to present all evidence in support of his claim. And the evidence so submitted was carefully

considered by the authorized delegate of the Attorney General before petitioner's request was denied.

But even if it were properly the function of the courts to review the evidence of persecution, the evidence submitted here by petitioner fell short of that needed to establish his claim of persecution (see the Statement, *supra*, pp. 2–4). Petitioner's vague and often conflicting testimony consisted principally of the claim that somebody had seen him attend church in the United States and had reported it, whereupon the captain of the vessel, or an unnamed commissar thereon, had told him that he would be punished for it upon his return to Yugoslavia. This evidence is insufficient to allow a seaman who had "jumped ship" and was later apprehended to remain in this country. The insubstantiality of such a claim is indicated by the fact that petitioner had regularly attended church in Yugoslavia, although he states secretly, and had never been punished for it or prevented from leaving Yugoslavia on various vessels over a period of years. Petitioner's fear of punishment for deserting his ship may be well grounded, but that would be no valid reason for withholding deportation. Petitioner's reference to the fact that some Yugoslavs have obtained relief under the Refugee Relief Act (Pet. 6–7) is not material since each case must necessarily turn on its own facts.[4]

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[4] Petitioner's other contentions are also clearly erroneous. Contrary to petitioner's claim (Pet. 6–7), the Special Inquiry Officer is not a prosecutory official—that is, an official who has already taken a position prior to the hearing. Instead, he acts merely to hear the evidence presented by the alien to sustain

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1960.

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his claim for discretionary relief and then to recommend a decision to the designee of the Attorney General. 8 C.F.R. 243.3(b). Since the Inquiry Officer must make a recommendation, it is obviously necessary that he ask questions going to the credibility and substantiality of the evidence presented.

Petitioner further claims (Pet. 3–8) that the court below was without jurisdiction to dismiss his appeal because he was before that court only on the limited question of whether a stay of deportation should be issued pending appeal. Since, however, a notice of an appeal had been filed by petitioner, the court of appeals had jurisdiction of the cause and could lawfully exercise its authority to dismiss the appeal. See 28 U.S.C. 2106.

APPENDIX

UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

File No. A9717347

NEW YORK DISTRICT, *July 7, 1958.*

MEMORANDUM AND RECOMMENDATION OF SPECIAL INQUIRY OFFICER

In the Case of Filip Jasa, Applicant for Relief Under Section 243(h) of the Immigration and Nationality Act

In Behalf of Applicant: Haskell R. Barst, Esq., 60 Broad Street, New York, N.Y.

Applicant is a 49 year old married male, a native and citizen of Yugoslavia who last entered the United States at Norfolk, Virginia on January 8, 1957 as a crewman. As a result of deportation proceedings instituted against him an order was entered on November 13, 1957 granting him permission to depart voluntarily but providing that upon his failure to depart when and as required he be deported. Upon his failure to effect departure a warrant of deportation was entered on January 17, 1958. In this proceeding he requests that his deportation to Yugoslavia be withheld pursuant to Section 243(h) of the Immigration and Nationality Act on the ground that he would be subject to persecution if deported to that country.

The record indicates that the applicant has had four years of schooling in his native country and after completing such schooling worked as a fisherman. He

served in the Yugoslav Navy from April 1931 to April 1933 at which time he was honorably discharged. In 1949 he left Yugoslavia as a seaman and continued to follow that calling until he effected his last entry into the United States. He first entered the United States in 1953 and made numerous return trips to his native country as a seaman last departing from Yugoslavia in November 1956. All his trips as a seaman were made on Yugoslav vessels. Since his arrival in the United States he has been employed as a restaurant worker and longshoreman.

The applicant's closest relatives in the United States are an uncle alleged to be a United States citizen and a nephew who has been placed under deportation proceedings. He has a wife, a son and two brothers residing in Yugoslavia. In addition, he has a brother in Argentina. The applicant stated that he has never belonged to any organizations except the Pomorska Sindikate (Seaman's Union). He has denied membership in the Communist Party of Yugoslavia.

The applicant's claim to fear of persecution if deported to Yugoslavia is based on several grounds. He claims that he is opposed to communism and has criticized the Communist Government of Yugoslavia in conversations with friends. He alleges that the fact that he deserted the Yugoslav vessel on which he last entered the United States and remained in this country would be construed as an indication of his opposition to the Communist Regime in his native country. He further claims that as a Roman Catholic he would not be allowed to practice his religion freely in his native country. Although he has admitted that the churches in Yugoslavia are open for public worship he claims that churchgoers are discriminated against in obtaining jobs and other

economic necessities. According to his testimony, in order to avoid such sanctions he has attended church secretly, but regularly, in his native country. He claims that while on shore leave in Boston following his last entry into the United States, the commissar on his vessel learned that he had attended church services here and threatened him with dismissal from the ship and other punishment upon his return to Yugoslavia. The applicant asserts that the alleged persecution in Yugoslavia will take the form of imprisonment or arrest.

In support of his claim the applicant has submitted extracts from a memorandum prepared by the Croatian Catholic Clergy of the United States of America and other parts of the free world, protesting against the absence of religious freedom in Yugoslavia. However, there is nothing in this memorandum showing physical persecution of the average Yugoslav layman on religious grounds. There has also been presented an affidavit of a native of Yugoslavia, now a naturalized United States citizen, who visited Yugoslavia from July to October 1954, stating that while the government there tolerated religious worship, such worship was permitted under threats which may affect the ability of the people to earn a livelihood. As the author of this affidavit has not been produced for cross-examination his affidavit has little, if any, probative value. Even if accepted at face value it shows at most the possibility of the imposition of economic sanctions, which fall far short of physical persecution. Finally, there has been presented a newspaper clipping of November 1, 1957 indicating that members of the Zellerbach Commission on the European refugee situation have suggested that Yugoslav escapees in Austria and Italy be classified as political escapees from communism rather than economic escapees. This clipping contains no factual

material that can resolve the issue in the instant case.

Careful review of all the evidence indicates that the applicant is an ordinary Yugoslav national who is not shown to have opposed actively the Communist Regime in his native country. He experienced no difficulty in obtaining a berth on Yugoslav vessels and was able to follow this calling without hindrance. Although it is possible that he may be punished for deserting a Yugoslav vessel, such punishment would result from a violation of the internal laws of Yugoslavia and is not deemed persecution within the meaning of Section 243(h) of the Immigration and Nationality Act. Despite the applicant's claim of religious persecution, his own testimony indicates that he was able to attend church services regularly in his native country and that he was never arrested or persecuted in any manner while in Yugoslavia. There is no proof that the applicant is more likely to be physically persecuted at the present time because of his religion or political opinions than while he lived in his native country. Accordingly, it is felt that he has failed to establish that he will be subject to physical persecution if deported to Yugoslavia and that his application should be denied.

Interim Decision 213 cited by counsel is not in point. That case involved an application by an ordained priest for adjustment of status under the Displaced Persons Act of 1948, as amended. To qualify for relief under that Act it was necessary for the subject to show "fear of persecution" upon his return to a foreign country. Under Section 243 (h) of the Immigration and Nationality Act however, an alien must establish that he "would be subject to physical persecution", which contemplates an immediate likelihood of physical punishment upon his return to a foreign country. This has not been established in the instant case.

RECOMMENDATION: Upon consideration of the entire record, it is recommended that the application to withhold deportation to Yugoslavia under Section 243(h) of the Immigration and Nationality Act, be denied, is that the applicant has failed to establish that he will be subject to physical persecution if so deported.

HENRY I. MILLMAN,
Special Inquiry Officer.

Upon consideration of the entire record, including the exceptions filed, we find that the exceptions are without merit and that the application should be denied.

SO ORDERED.

CHARLES C. DAVIE,
Regional Commissioner.

JULY 21, 1958.

U.S. GOVERNMENT PRINTING OFFICE